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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 JAHIR ALBERTO ROJAS,

9 Plaintiff,

10 v.

11 R. LOZA, Correctional Officer, R.
12 SINGH, Correctional Officer, D.
13 SANDOVAL, Correctional Officer,

14 Defendants.

) No. C 07-4662 MMC (PR)

) **ORDER OF SERVICE; DENYING**
) **MOTION FOR APPOINTMENT OF**
) **COUNSEL**

) **(Docket No. 3)**

15 On September 10, 2007, plaintiff, a California prisoner incarcerated at Salinas Valley
16 State Prison (“SVSP”) and proceeding pro se, filed the above-titled civil rights action under
17 42 U.S.C. § 1983 against various SVSP employees.¹ That same date, plaintiff filed a motion
18 for appointment of counsel.

19 **DISCUSSION**

20 A. Standard of Review

21 A federal court must conduct a preliminary screening in any case in which a prisoner
22 seeks redress from a governmental entity or officer or employee of a governmental entity.
23 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
24 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
25 be granted or seek monetary relief from a defendant who is immune from such relief. See id.
26 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v.

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28 ¹By separate order filed concurrently herewith, plaintiff has been granted leave to
proceed in forma pauperis.

1 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.
2 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the
3 Constitution or laws of the United States was violated, and (2) that the alleged violation was
4 committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42,
5 48 (1988).

6 B. Plaintiff's Claims

7 Plaintiff alleges that on February 12, 2007, SVSP Correctional Officers R. Loza, R.
8 Singh and D. Sandoval used unwarranted force when they removed him from the yard by
9 handcuffing him too tightly, lifting him off the ground by his handcuffs, throwing him to the
10 ground, and spraying him with pepper spray, and by assaulting him after they had moved him
11 inside. Plaintiff alleges he sustained physical and mental injury as the result of the officers'
12 actions. He seeks monetary damages.

13 Plaintiff's allegations, when liberally construed, state a cognizable claim for the
14 violation of plaintiff's right, under the Eighth Amendment, to be free from the use of
15 excessive force. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992).

16 C. Motion for Appointment of Counsel

17 Plaintiff has filed a motion for appointment of counsel. There is no constitutional
18 right to counsel in a civil case such as this. See Lassiter v. Dep't of Social Services, 452 U.S.
19 18, 25 (1981). Rather, pursuant to 28 U.S.C. § 1915, a district court has the power to
20 "request" that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C.
21 § 1915(e)(1). To date, plaintiff has been able to present his claims in an adequate manner
22 and there are no exceptional circumstances warranting appointment of counsel at this time.
23 Should the circumstances of the case materially change, the Court may reconsider plaintiff's
24 request sua sponte.

25 **CONCLUSION**

26 For the reasons stated above, the Court orders as follows:

- 27 1. Plaintiff's motion for the appointment of counsel is hereby DENIED. (Docket No.
28 3.)

2. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all attachments thereto, and a copy of this order upon **Correctional Officers R. Loza, R. Singh and D. Sandoval**, at **Salinas Valley State Prison**. The Clerk shall also mail courtesy copies of the complaint and this order to the California Attorney General's Office.

3. Within **ninety (90)** days of the date this order is filed, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims found to be cognizable above.

a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.**

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:²

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss

²The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

5. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

1 7. All communications by the plaintiff with the Court must be served on defendants,
2 or defendants' counsel once counsel has been designated, by mailing a true copy of the
3 document to defendants or defendants' counsel.

4 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
5 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
6 required before the parties may conduct discovery.


7 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
8 informed of any change of address and must comply with the court's orders in a timely
9 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
10 pursuant to Federal Rule of Civil Procedure 41(b).

11 10. Any motion for an extension of time must be filed no later than the deadline
12 sought to be extended and must be accompanied by a showing of good cause.

13 This order terminates Docket No. 3.

14 IT IS SO ORDERED.

15 DATED: April 28, 2008

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17 MAXINE M. CHESNEY
18 United States District Judge
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